In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern Division of Georgia sustaining a petition for a writ of habeas corpus and directing the discharge of respondent from custody.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 135-140) is reported at 175 F. 2d 273. The opinion of the District Court (R. 104-109) is reported at 81 F. Supp. 647.

JURISDICTION

The judgment of the Court of Appeals was entered June 16, 1949 (R. 140). On September 13, 1949, by order of Mr. Justice Black, the time

within which to file a petition for a writ of certiorari was extended to and including September 30, 1949 (R. 142). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination by the military authority appointing a general court-martial, in detailing as law member thereof an officer not in the Judge Advocate General's Department, that an officer of that Department was "not available for the purpose" within Article of War 8, is subject to collateral attack on habeas corpus.

2. Whether allegedly prejudicial errors and irregularities in a court-martial proceeding are judicially reviewable on collateral attack, where such errors do not relate to the jurisdiction of the court-martial.

STATUTE INVOLVED

The second paragraph of the 8th Article of War (10 U.S.C. (1946 ed.) 1479), provided at all times relevant hereto as follows:

> The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member,

shall perform such other duties as the President may by regulations prescribe.

STATEMENT

On January 9 and 14, 1947, respondent, then serving as a soldier with the rank of Technician, Fifth Grade, in the Occupation Forces of the United States Army, was tried and convicted of murder, in violation of the 92d Article of War (10 U.S.C. 1564), by a general court-martial held at Mannheim, Germany (R. Vol. II, 53). He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to confinement at hard labor for life (R. Vol. II, 96-97). After review of the record of trial by the Staff Judge Advocate (R. Vol. II, 15-20; see also AW 46, 10 U.S.C. 1517), the appointing authority approved the sentence and forwarded it for confirmation (R. Vol. II, 98). Thereafter, pursuant to AW 50½, 10 U.S.C. 1522, the record was examined by a Board of Review in the Office of the Judge Advocate General. The Board rendered an opinion, holding that the record of trial was legally sufficient to support the sentence (R. Vol. II, 5-6). The Judge Advocate General approved the holding of the Board of Review, but in view of the circumstances of the case recommended that the period of confinement be reduced to twenty years (R. Vol. II, 6-7). On May 16, 1947, General Orders No. 190, Headquarters, Continental Base Section, European Command, were published, reducing the sentence to twenty years' imprisonment and desig-

nating the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct, as the place of confinement (R. Vol. II, 7-8). Respondent was committed to the United States Penitentiary, Atlanta, Georgia, on September 24, 1947 (R. 31).

On July 16, 1948, respondent filed in the District Court for the Northern District of Georgia a petition for a writ of habeas corpus alleging, as thrice amended (R. 1-16, 38-40, 46-48, 50), that the court-martial was not legally constituted under the provisions of AW 8 (*supra*, pp. 2-3) and was therefore without jurisdiction because the Law Member was not an officer of the Judge Advocate General's Department, although an officer of that department "was available for the purpose" (R. 39-40); that the sentence of the court was invalid because it was based upon a finding of guilty by only two-thirds instead of three-fourths of the members of the court (R. 13-14); that the pre-trial investigation was not thorough and did not comply with the requirements of AW 70 (10 U.S.C. 1542) in other respects (R. 5-11, 38-39, 47-48); and that he was not afforded the effective assistance of counsel at his trial (R. 12, 50).

The writ issued (R. 67) and a hearing was held at which respondent was the only witness (R. 79-103). Thereafter, on review of the testimony and the record of respondent's trial (Vol. II of the record here), the District Court on November 17, 1948, entered an opinion and order sustaining the

writ and directing that petitioner discharge respondent from custody (R. 104-109). The decision was based solely upon the order of the Commanding General of December 7, 1946, establishing a general court-martial "for the trial of such persons as may be properly brought before it."[1] Of the 19 officers appointed to the detail for the court, one—Captain Jack H. Chalkley—was a member of the Judge Advocate General's Department. He and a Captain of the Adjutant General's Department were designated as Assistant Trial Judge Advocates, the Trial Judge Advocate being a Captain of the Medical Administrative Corps. A Major, a Captain and a 1st Lieutenant of Infantry were designated as Defense Counsel and Assistant Defense Counsel, respectively. A Colonel of Field Artillery was appointed Law Member and the other members of the court were officers from other branches of the services. (R. Vol. II, 53-54.). The record of trial also showed, however, that Captain Chalkley, as well as the two Assistant Defense Counsel and four members of the court, were absent when respondent's case was tried on January 9 and 14, 1947. Specifically, it showed that Captain Chalkley and one of the members of the court were absent "VOCG" (verbal orders of the commanding general). (R. Vol. II, 54-55, 91, 97).[2] The District Court held

[1] The offense for which respondent was tried by this court-martial was committed on December 25, 1946 (R. Vol. II, 56).

[2] At the opening of the trial "The accused stated he desired to be defended by the regularly appointed defense counsel" (R. Vol. II, 55).

that AW 8 required that the law member of a court-martial be a member of the Judge Advocate General's Department, "except in the single instance where such officer was not available," and that where an officer of that department was "available," "No discretion whatever was given the appointing authority." Accordingly, since the record showed the appointment of a member of that department—Captain Chalkley—to the detail for the court-martial and there was no showing on the record or by extrinsic evidence as to why he was not appointed Law Member, the court concluded that he was "available" for that purpose, that the failure to appoint him Law Member constituted a violation of AW 8, and that the court-martial was therefore "illegally constituted" and without jurisdiction. (R. 105, 107-108.) The court rejected respondent's other contentions, holding, *inter alia*, that the record showed substantial compliance with AW 70 in the pre-trial investigation (R. 108-109).

On appeal by petitioner (R. 110) and cross-appeal by respondent (R. 111), the Court of Appeals in affirming, one judge dissenting (R. 140), adopted the reasoning of the District Court on the AW 8 point (R. 136-138).[3] But beyond this, the

[3] The Court of Appeals was in error in assuming that both the Assistant Trial Judge Advocates detailed to the court-martial were officers of the Judge Advocate General's Department (see R. 136, 137, 138 note 1). Captain Royston, the other assistant, was a member of the Adjutant General's Department. Apparently the court was confused by the letters "AGD" appearing after his name in the order establishing the court-martial. (R. Vol. II, 53.)

Court of Appeals, although recognizing "that it is no longer our province to review the evidence in a court-martial proceeding" (R. 139), held that "The record of this court-martial conviction is replete with highly prejudicial errors and irregularities" (R. 138) which, in their "cumulative effect * * * [lead] unerringly to the conclusion that this petitioner has not been accorded a fair trial, even under military law" (R. 139). The court listed the "errors and irregularities" it had found as follows (R. 138-139):

> (1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.
>
> (2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.
>
> (3) The record reveals that the law member appointed was grossly incompetent.
>
> (4) There was no pre-trial investigation whatever upon the charge of murder.
>
> (5) The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.
>
> (6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.

In view of its conclusion that respondent's conviction was invalid, "both because his court-mar-

tial was without jurisdiction, and because he has not been afforded due process of law," the court found it unnecessary to pass upon his other assignments of error (R. 140).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In undertaking to review the appointing authority's exercise of discretion under Article of War 8 in designating as law member of a general court-martial an officer not in the Judge Advocate General's Department.

2. In undertaking to review on collateral attack alleged errors and irregularities in the pre-trial and court-martial proceedings which did not affect the jurisdiction of the court-martial.

3. In affirming the order of the District Court discharging respondent from custody.

REASONS FOR GRANTING THE WRIT

1. The decision below on the question raised under AW 8 is erroneous and is in direct conflict with the recent decision of the Second Circuit in *Henry* v. *Hodges*, 171 F. 2d 401, certiorari denied, 336 U. S. 968. In that case, two officers of the Judge Advocate General's Department—Lt. Colonel Beatty and 2d Lieutenant Swan—were appointed as Defense Counsel and Assistant Trial Judge Advocate, respectively, and they served as such at the trial of Henry and his co-defendant Felman, although Henry was also represented by civilian counsel of his own choosing. Colonel Dar-

ling, Cavalry, was detailed as President and Law Member of the court-martial. At the opening of the trial, Henry challenged Colonel Darling as Law Member for cause under AW 8 and interposed a plea to the jurisdiction of the court-martial on the ground that he was not a member of the Judge Advocate General's Department, whereas Lt. Colonel Beatty, an officer of that department, was available to the appointing authority for detail as Law Member. The court-martial overruled the challenge and plea and these rulings were held correct on review both by the Staff Judge Advocate and the Board of Review. See our brief in opposition, No. 598, O.T. 1948, pp. 10-14. In rejecting Henry's attack upon the jurisdiction of the court-martial based on AW 8, the Second Circuit said (171 F. 2d at 403):

> There remains the second question: The irregularity in the constitution of the court, i.e., whether any member of the Judge Advocate General's Department was "available" at the time. We cannot say that it was not more in the interest of justice to detail Beatty to defend Feltman than to put him on the court; or that it was not better judgment to make Swan a prosecutor than a judge; and these were the only officers of the Department whom Henry claims to have been "available." The whole question is especially one of discretion; and, if it is ever reviewable, certainly the record at bar is without evidence which would justify a review. The commanding officer who con-

> venes the court must decide what membership will be least to the "injury of the service," and what officers are "available." "Available" means more than presently "accessible"; it demands a balance between the conflicting demands upon the service, and it must be determined on the spot.

This decision of the Second Circuit points up the error in the decisions below. For both courts below considered that Captain Chalkley's appointment to the detail on December 7, 1946, showed conclusively that he, as an officer of the Judge Advocate General's Department, was "available" both on that date and later, in January 1947, when respondent's case was tried.[4] But those courts overlooked the fact that AW 8 reads, "available for the purpose," i.e., for detail as Law Member, and not merely "available." And they also overlooked the provision of AW 4 (10 U.S.C. 1475), *in pari materia*, that the appointing authority of a court-martial "shall detail as members thereof those officers of the command, who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service

[4] As noted above, Captain Chalkley was absent from the trial on the verbal orders of the commanding general, and it must be presumed that the latter had good and sufficient reasons for excusing Captain Chalkley. Of course, whether an officer is "available" for a particular trial must be determined as of the date of the trial or shortly before, rather than as of the earlier date of the appointment of the court "for the trial of such persons as may be properly brought before it." (R. Vol. II, 53).

shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts martial in excess of the minority membership thereof." As the Second Circuit pointed out, these provisions vest a large measure of discretion in the appointing authority. He must choose between competing demands for the services of officers within his command. AW 8 imposes no inflexible limitation upon his choice of a Law Member.[5] "Available for the purpose" does not connote the mere physical presence of an officer or officers of the Judge Advocate General's Department within the command. On the contrary, the choice involves the exercise of an informed judgment based upon an evaluation of the factors enumerated in AW 4 and the exigencies of the moment, which a court is in no position to appraise in retrospect. This Court has consistently held in analogous situations that the exercise of a discretion so broadly vested in the appointing authority will not be reviewed by the courts. *Martin* v. *Mott*, 12 Wheat. 19, 34-35; *Mullan* v. *United States*, 140 U. S. 240, 243-245; *Swaim* v. *United States*, 165 U. S. 553, 559-560; cf. *Wade* v. *Hunter*, 336 U. S. 684, 691-692.

[5] In contrast, see the new AW 8 which became effective February 1, 1949 (10 U. S. C., Supp. II, 1479), in which the requirement to appoint as law officer a member of the Judge Advocate General's Corps or an officer who is a lawyer certified by the Judge Advocate General to be qualified for such detail, no longer contains the phrase "available for the purpose." And see the new *Manual for Courts-martial* (1949), Section 4(c), p. 3.

We submit, therefore, that the courts below were wrong in substituting their judgment for that of the Commanding General in his choice of the Law Member of the court-martial. The applicable provisions of the Articles of War committed the discretion to him and his judgment may not be reviewed collaterally.

The importance of this question, apart from the conflict between the decision below and the Second Circuit's *Henry* decision, is indicated by the fact that the District Court for the Northern District of Georgia has, since the Court of Appeals' decision came down, ordered the discharge of three more prisoners on the same ground. The Government has taken an appeal in each of these cases. In addition, we are advised that approximately 60 similar cases have been filed by prisoners, chiefly in the Northern District of Georgia, and that the question affects a great but indeterminable number of other prisoners now serving general court-martial sentences.

2. The action of the Court of Appeals in undertaking a censorious review of the court-martial record and its holding that a number of "prejudicial errors and irregularities" which it gleaned from the record were tantamount in their totality to a denial of "due process of law" resulting in the loss of jurisdiction, is in the teeth of the repeated admonitions of this Court that the actions of military tribunals within their jurisdiction are "not subject to judicial review merely because they have

made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions." *In re Yamashita*, 327 U. S. 1, 8, and cases cited. See also *Humphrey* v. *Smith*, 336 U. S. 695, 696; *Ex parte Quirin*, 317 U. S. 1, 25. Thus, the court below thought that the prosecution proceeded on an erroneous theory that although he was on sentry duty at the time of the killing, respondent was required to retreat from his post (item (1) in the court's listing of errors, *supra*, p. 7); that there was not sufficient evidence of malice, premeditation, or deliberation (item (2)); and that the reviewing authorities were guilty of "a total misconception of the applicable law" in sustaining respondent's conviction (item (6)).[6] In addition, the court concluded, without elaboration, from its examination of the record that the Law Member and Defense Counsel were incompetent (items (3) and (5)). But these were matters within the exclusive competence of the military authorities to decide. Their "errors of decision," if any there were, are not subject to collateral review on habeas corpus.

[6] The court's criticism that there was no pre-trial investigation of the charge of murder, but only investigation of an earlier charge of manslaughter (item (4); R. 139, note 4) is obviously irrelevant to the issue of the court-martial's jurisdiction, in view of the recent decision of this Court in *Humphrey* v. *Smith*, 336 U.S. at 700, that "a failure to conduct pre-trial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments."

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v.

EUGENE PRESTON BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 67-71) is reported at 175 F. 2d 273. The opinion of the District Court (R. 51-54) is reported at 81 F. Supp. 647.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1949 (R. 72). On September 13, 1949, by order of Mr. Justice Black, the time within which to file a petition for a writ of

certiorari was extended to and including September 30, 1949 (R. 72). The petition for a writ of certiorari was filed on September 30, 1949, and was granted on December 5, 1949. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination by the military authority appointing a general court-martial, in detailing as law member thereof an officer not in the Judge Advocate General's Department, that an officer of that Department was "not available for the purpose" within Article of War 8, is subject to collateral attack on habeas corpus.

2. Whether the court-martial proceedings reflect prejudicial errors and irregularities which warrant respondent's release on habeas corpus.

STATUTE INVOLVED

The second paragraph of the 8th Article of War (10 U.S.C. (1946 ed.) 1479), provided at all times relevant hereto as follows:

> The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law

member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe.

STATEMENT

On December 25, 1946, respondent, then a Technician, Fifth Grade, in the Occupation Forces of the United States Army, was on sentry duty in the guardhouse at the motor pool in the town of Feuerbach, Germany (R. Vol. II, 58-59). With him was a German girl named Elizabeth Rehm (R. Vol. II, 63). Two Polish guards, stationed at the motor pool, entered the guardhouse and were ordered to leave by respondent (R. Vol. II, 60). They were both unarmed (R. Vol. II, 79, 87). They left the house and respondent, who had followed, stopped at the door and shot one of them (R. Vol. II, 60), who died as a result of the wound (R. Vol. II, 76). The shooting occurred at about 8:05 P.M. (R. Vol. II, 79-81, 83).

This much is uncontradicted. Respondent was thereafter charged with violation of the 93rd Article of War, covering various crimes including manslaughter, but not murder, and a pretrial investigation was ordered and actually conducted. All available witnesses were examined and the substance of their testimony was reduced to writing. (R. Vol. II, 21, 27-36.) The charges, together with the report of the investigation, were duly referred to the commanding officer who appointed a court-martial and directed the trial of respondent for

violation of the 92nd Article of War, covering murder (R. Vol. II, 23, 53-54; see also R. 4, 11, specification 26 and response thereto). There was no further pretrial investigation. By Special Order 273, thirteen officers were detailed to the general court-martial. The senior officer, Colonel James E. Bush, was designated the law member. Three captains were detailed as trial and assistant trial judge advocates. A major, captain and 1st lieutenant were detailed as defense and assistant defense counsel. The only member of the Judge Advocate General's Department named in the order,[1] Captain Jack H. Chalkley, was designated one of the assistant trial judge advocates. (R. Vol. II, 53.)

The trial was begun on January 9, 1947. Nine members of the court, including the law member, were present. Three had been transferred and one was absent "VOCG" (verbal orders of the commanding general). Also absent VOCG was assistant trial judge advocate Captain Chalkley of the

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[1] The court below erroneously assumed that another officer of the Judge Advocate General's Department had been named as assistant trial judge advocate (R. 68). It probably had in mind Captain John E. Royston of the Adjutant General's Department. The initials, AGD, may have been confused with JAGD, which stands for the Judge Advocate General's Department.

The respondent speaks of a Captain Sams (JAGD) as having been available (Special Appearance and Br., pp. 7-8), but he was simply an officer who administered the oath to the officer at Continental Base Section Headquarters who investigated and signed the charges and specifications (R. Vol. II, 22). Captain Sams could not have been in the mind of the Court of Appeals (R. 68) since he was not named an assistant trial judge advocate in the order convening the court martial (R. Vol. II, 53).

Judge Advocate General's Department. The two assistant defense counsel had been transferred. (R. Vol. II, 54-55.) Before any testimony was taken, respondent was asked whom he desired to introduce as defense counsel and replied that he wanted to be defended by the regularly appointed defense counsel (R. Vol. II, 55). Being then informed that he could challenge any member of the court for cause and any one member, other than the law member, peremptorily, he made no challenge (R. Vol. II, 56). He pleaded not guilty (R. Vol. II, 57) and the trial proceeded (R. Vol. II, 58-77). Respondent, having been advised as to his rights, then declared that he wanted to take the stand and make a sworn statement (R. Vol. II, 77).

His version of the events leading to the shooting was that the two Polish guards came into the guard hut, as he thought, to get warm. But they "grabbed the girl and started saying something or other to her" (R. Vol. II, 81). He told them to leave and "one of them struck his fist at me on the lip" (R. Vol. II, 78, 81-82). He again told them to leave and they did so after a very short interval (R. Vol. II, 81-82). He then took his pistol from "behind the coal box at the guardhouse" and "walked to the door" (R. Vol. II, 78, 82). The deceased, who was two or three feet from the door, swung a bottle at him three times, missing him each time. Respondent loaded his pistol and, as the deceased swung around again, shot him (R. Vol. II, 83-84).

The surviving Polish guard categorically denied that there was any violence inside the guardhouse, that either he or the deceased had had a bottle of any description at the time and place of the occurrence or that anyone was struck at with a bottle or other instrument (R. Vol. II, 86). On the contrary, this witness testified that he and his companion entered the guardhouse, he said "good evening", and that respondent thereupon drew his pistol and ordered them out. They left but respondent followed them and stopped at the door. When they were about a meter away from him the witness said, "Boy, it is OK what you do." Respondent then fired the fatal shot. (R. Vol. II, 59-60.) This testimony, in substantial respects, was corroborated by the only other eye witness, Elizabeth Rehm, the German girl who was present at the time of the shooting (R. Vol. II, 63-68). She confirmed that the Polish guards entered, said "Hello", were ordered out and left, and that respondent went to the door and fired the shot after something was said (R. Vol. II, 65, 66, 68). Two American soldiers who came to the scene within about four minutes of the shooting testified that they saw no bottle any place around the guardhouse (R. Vol. II, 72, 75-76).

The case was continued until January 14, 1947, on which date two more members of the court, having been transferred, were absent (R. Vol. II, 91). On this occasion, a witness, who had relieved respondent on guard duty between 8:30 and 9:00 P.M.

on the night of the shooting, was called and he testified that he had seen a bottle about twelve inches long and three inches in diameter inside the guardhouse (R. Vol. II, 93-94). Respondent, recalled at his own request, testified that he had picked up the bottle and set it down inside the door of the guardhouse after the deceased had dropped it (R. Vol. II, 95-96).

Respondent was found guilty upon the concurrence of two-thirds of the members of the court and, three-fourths of the members agreeing, was sentenced to be dishonorably discharged, to forfeit all pay and allowances and to be confined at hard labor for life (R. Vol. II, 96-97).

Pursuant to the 46th Article of War (10 U. S. C. 1517), the Staff Judge Advocate reviewed the record and recommended approval of the sentence (R. Vol. II, 15-20), which was approved by the appointing authority (R. Vol. II, 98).

The Board of Review of the Office of the Judge Advocate General, pursuant to AW 50½ (10 U. S. C. 1522), held, on review, that the record was legally sufficient to support the sentence (R. Vol. II, 5-6). The Judge Advocate General approved this holding but recommended a reduction of the term of confinement to twenty years (R. Vol. II, 6-7). This recommendation was followed in General Orders No. 190, which designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct, as the place of confinement (R. Vol. II, 7-8). Re-

spondent was committed to the United States Penitentiary, Atlanta, Georgia, on September 24, 1947 (R. 15-16).

Respondent, on July 16, 1948, petitioned the District Court for the Northern District of Georgia for a writ of habeas corpus alleging, as thrice amended (R. 1-8, 18-20, 22-24), that the court-martial was not legally constituted under the provisions of AW 8 and was therefore without jurisdiction because the law member was not an officer of the Judge Advocate General's Department, although an officer of that department "was available for the purpose" (R. 19); that the sentence was invalid because it was based upon a finding of guilty by only two-thirds instead of three-fourths of the members of the court (R. 7); that the pretrial investigation was not thorough and failed to comply with the requirements of AW 70 (10 U. S. C. 1542) in other respects (R. 3-6, 18-19, 22-23); and that he was not afforded the effective assistance of counsel at the trial (R. 6-7, 23-24, 50).

The writ issued (R. 32) and upon the hearing, at which respondent was the sole witness (R. 37-50), and review of the record of the court-martial (Vol. II of the record here), the district court sustained the writ, directing petitioner to discharge respondent from custody. Rejecting all of respondent's other objections, the decision rested exclusively upon the holding that failure to designate as law member a member of the Judge Advocate General's Department when one, Captain Chalkley, was avail-

able, deprived the court-martial of jurisdiction to which compliance with AW 8 was a condition precedent (R. 51-54).

On appeal by petitioner (R. 54) and cross-appeal by respondent (R. 55), the Court of Appeals, in affirming, one judge dissenting (R. 71), adopted the reasoning of the district court on the AW 8 point (R. 67-70). But beyond this, the majority, although recognizing "that it is no longer our province to review the evidence in a court-martial proceeding" (R. 71), held that "The record of this court-martial conviction is replete with highly prejudicial errors and irregularities" (R. 70) which, in their "cumulative effect * * * [lead] unerringly to the conclusion that this petitioner has not been accorded a fair trial, even under military law" (R. 71). The court listed the "errors and irregularities" it had found as follows (R. 70):

> (1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.
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> (2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.
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> (3) The record reveals that the law member appointed was grossly incompetent.
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> (4) There was no pretrial investigation whatever upon the charge of murder.
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> (5) The record shows that counsel appointed to defend the accused was incompetent, gave

no preparation to the case, and submitted only a token defense.

(6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.

In view of its conclusion that respondent's conviction was invalid, "both because his court-martial was without jurisdiction, and because he has not been afforded due process of law," the court found it unnecessary to pass upon his other assignments of error (R. 71).

SUMMARY OF ARGUMENT

I

A. AW 8 permits the authority appointing a court-martial to detail a law member who is not an officer of the Judge Advocate General's Department "when an officer of that department is not available *for the purpose*" (emphasis supplied). As Judge Learned Hand recently said in rendering a decision of the Court of Appeals for the Second Circuit, the determination of availability "for the purpose" "demands a balance between the conflicting demands upon the service, and it must be determined on the spot." *Henry* v. *Hodges*, 171 F. 2d 401, 403, certiorari denied, 336 U. S. 968.

This Court has held that the decision of the authority appointing a court-martial as to the composition of the court within the outside limits fixed by statute must be conclusive. *Martin* v. *Mott*,

12 Wheat. 19; *Mullan* v. *United States*, 140 U. S. 240; *Swaim* v. *United States*, 165 U. S. 553; *Bishop* v. *United States*, 197 U. S. 334; *Kahn* v. *Anderson*, 255 U. S. 1. And that principle was well established when, in 1920, Congress enacted AW 8.

B. The legislative history confirms the conclusion which may be derived alone from a reading of AW 8 in the light of this Court's earlier decisions. It plainly appears that Congress proposed to confer on the appointing authority power not only to determine the mere physical availability of a JAG officer but the relative suitability of an officer of the JAG and others qualified to act as law member under AW 8. It is clear, also, from the legislative history, that the appointing authority's discretionary power is one whose exercise cannot be challenged in the civil courts as jurisdictional error.

The 1949 amendment of AW 8 was not declaratory; it worked a distinct change in the provisions applicable to the detail of a law member of a court-martial. It can only be concluded from the history of this amendment that Congress understood AW 8, as it stood at the date of respondent's court-martial, as investing in the appointing authority a complete discretionary power to determine whether an officer of the Judge Advocate General's Department was "available for the purpose" of serving as law member of a court-martial.

C. The Army has consistently construed AW 8 as granting to the appointing authority the power finally to decide whether "the interests of efficient administration of justice and exercise of command" (CM 209988, Cromwell, 9 B. R. 169, 196 (1938)) demand the appointment as law member of one other than an officer of the Judge Advocate General's Department. This interpretation is entitled to great weight. *United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210, 216.

D. There is nothing on the face of the order convening the court-martial which tried respondent to indicate that the appointing authority abused his discretion in failing to detail as law member an officer of the Judge Advocate General's Department. That such an officer was detailed to be an assistant trial judge advocate may signify his physical availability, nothing more. But, as we have seen, the appointing authority must consider not only physical availability but relative suitability.

II

A. While paying lip-service to the rule that civil courts have power to determine only whether the court-martial had jurisdiction, the court below concluded that respondent should be released on habeas corpus largely because its views as to the law and the evidence differed from what it thought, in part mistakenly, were those of the appropriate military tribunals. But errors in rulings on fact and law

are not bases for habeas corpus; in this case, moreover, the military decisions were well grounded.

B. To assume to judge, as did the court below, of the competency of members of the court-martial is treacherous business. And there is no warrant in the record for the conclusion that the law member was so incompetent and defense counsel so inadequate as to make respondent's military trial unfair.

C. Respondent did, in fact, have the substantial benefits of the pre-trial investigation for which provision is made in AW 70. In any event, failure to comply with AW 70 is not ground for habeas corpus. *Humphrey* v. *Smith*, 336 U. S. 695.

ARGUMENT

I

The Determination of the Authority Appointing a General Court-Martial That an Officer of the Judge Advocate General's Department Is Not Available for Detail as Law Member Is Conclusive, and Not Subject to Review

A. *AW 8, read in the light of decisions of this Court rendered before its enactment, confers on the appointing authority a complete discretion.*— The language of the statute which requires the detail of a law member of a general court-martial, AW 8, confers a broad discretion on the appointing authority. He must detail a law member

> * * * who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not avail-

> able for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specifically qualified to perform the duties of law member. * * *

The statute reads "available for the purpose," not merely "available." Consequently, as the Judge Advocate General has held, AW 8 "imports not only the narrow concept of physical accessibility, but also the broader concept of discretion in the determination of the suitability of the person." CM 231963, Hatteberg, 18 B. R. 349, 368 (1943), summarized in 2 Bull. JAG, p. 304, sec. 365(9); cf. CM ETO 804, O'Detree, 2 B. R. (ETO) 337 (1943), summarized in 2 Bull. JAG, p. 466, sec. 365(9); CM 209988, Cromwell, 9 B. R. 169, 196 (1938); Dig. Op. JAG (1912-1940), sec. 365(9)(6), p. 176.[2]

This view was sustained in *Henry* v. *Hodges*, 171 F. 2d 401 (C. A. 2), certiorari denied, 336 U. S. 968, in which the court (per L. Hand, J.) said at p. 403:

> There remains the second question: The irregularity in the constitution of the court, i.e., whether any member of the Judge Advocate General's Department was "available" at the time. We cannot say that it was not more in the interest of justice to detail Beatty to defend Feltman than to put him on the court; or that it was not better judgment to make Swan a

[2] For a discussion of these court-martial cases see *infra*, pp. 27-30.

prosecutor than a judge; and these were the only officers of the Department whom Henry claims to have been "available." The whole question is especially one of discretion; and, if it is ever reviewable, certainly the record at bar is without evidence which would justify a review. The commanding officer who convenes the court must decide what membership will be least to the "injury of the service," and what officers are "available." "Available" means more than presently "accessible"; it demands a balance between the conflicting demands upon the service, and it must be determined on the spot.

Under AW 8, the appointing authority, as we think the Second Circuit correctly pointed out, is not confined to determining the physical availability; he must decide whether, as required by AW 4, the person detailed is "best qualified for the duty by reason of age, training, experience and judicial temperament". The mere fact, therefore, that Captain Chalkley, a JAG officer, was appointed assistant trial judge advocate of the court which tried respondent affords no basis for the assumption made below that he was available for the purpose of acting as law member, or that he was better qualified than Col. James E. Bush, the senior officer, who was actually designated. The considerations controlling the determination of availability obviously required the exercise of discretion in view of the circumstances immediately prevailing which a

court cannot adequately judge in retrospect.[3] See also *infra*, pp. 30-32.

This Court has held, in circumstances closely paralleling those at bar, that the exercise of so broad a discretionary power as that here conferred, will not be reviewed in the courts. *Martin* v. *Mott*, 12 Wheat. 19; *Mullan* v. *United States*, 140 U. S. 240; *Swaim* v. *United States*, 165 U. S. 553; *Bishop* v. *United States*, 197 U. S. 334; *Kahn* v. *Anderson*, 255 U. S. 1. Of these cases, four were decided before AW 8 was enacted in 1920. Their teaching cannot be presumed to have been lost on Congress.

In *Martin* v. *Mott*, *supra*, reliance was placed on AW 64 of 1806 (Act of April 10, 1806, c. 20, 2 Stat. 359, 367) which provided that

> General courts martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.

It was contended that the court-martial was not composed of the proper number of officers required by law. But the Court held, *per* Story, J. (12 Wheat. at 35), "that the act is merely directory to

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[3] The respondent does not suggest that AW 8 required the appointment of a lawyer as law member even if a JAG officer was not "available for the purpose." No such contention is advanced no doubt because AW 8 would specifically have so provided if that had been intended (see *infra*, pp. 21, 24-26) and, consequently, AW 8 has never been so understood (see Wiener, *Military Justice for the Field Soldier* (1944 ed.) p. 64).

the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive.'

Similarly, in *Mullan* v. *United States, supra,* the statutory provision in question was Article for the Government of the Navy 39 (R. S. 1624), reading in pertinent part as follows:

> A general court martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case where it can be avoided without injury to the service, shall more than one-half, exclusive of the President, be junior to the officer to be tried. * * *

Mullan, an officer in the Navy, was tried on board a naval vessel at Hong Kong by a court-martial of seven officers, five of whom were junior to him. He established that at the time of the organization of the court-martial there were twelve more officers of higher rank than he on waiting orders in the City of Washington, and that, at about the same time, seven officers had been sent from New York to Panama for the trial of a medical officer there, in view of the fact that in the squadron at Panama there were not the requisite number of officers of sufficient rank to organize the court for that trial.

This Court held, on the authority of *Martin* v. *Mott*, that the judgment of the appointing authority could not be collaterally attacked, saying (140 U. S. at 245):

> * * * Whether the interests of the service admitted of a postponement of his trial until a court could be organized of which at least one-half of its members, exclusive of the President, would be his seniors in rank, or whether the interests of the service required a prompt trial, upon the charges preferred, by such officers as could be then assigned to that duty by the commander-in-chief of the squadron, were matters committed by the statute to the determination of that officer. And the courts must assume—nothing to the contrary appearing upon the face of the order convening the court—that the discretion conferred upon him was properly exercised, and, therefore, that the trial of the appellant by a court, the majority of whom were his juniors in rank, could not be avoided "without injury to the service." "Whenever," this court said in *Martin* v. *Mott*, 12 Wheat. 19, 31, "a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

An analogous situation was presented in the *Swaim* case. AW 79 of 1874 (R. S. 1342) provided that—

> Officers shall be tried only by general courts-martial; and no officer shall, when it can be

avoided, be tried by officers inferior to him in rank.

Swaim, a brigadier general, was tried by a court-martial composed of 11 officers, of whom 6 were only colonels, at a time when there were, exclusive of himself, nineteen general officers in the Army (28 C. Cls. at 184, 202); and he accordingly contended that the court-martial was illegally constituted. But this Court held that the discretion of the President, who had convened the court-martial, could not be collaterally attacked. It said (165 U. S. at 560):

> In the present case, several considerations might have determined the selection of the members of the court, such as the health of the officers within convenient distance, or the injury to the public interests by detaching officers from their stations. The presumption must be that the President, in detailing the officers named to compose the court-martial, acted in pursuance of law. The sentence cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.[4]

[4] In *Bishop* v. *United States*, 197 U.S. 334, the Court reiterated the rule announced in the above-cited cases but went on to say that an alleged defect in the composition of the court martial was not only a waivable objection but one which had in fact been waived. When this Court's ruling in that respect (197 U.S. 340) is compared with what happened at respondent's arraignment here (R. Vol. II, 56), it would seem clear that this case can be disposed of on the ground that respondent waived any right to object to the alleged violation of AW 8 in failing to designate a JAG officer as law member.

That Congress, in enacting AW 8, intended no broader review of the appointing authority's determination than is reflected in the foregoing decisions is evidenced by the flexibility provided with respect to participation by the law member in any particular court-martial proceeding. The settled rule is that when the order convening the court-martial does not contain a specific contrary provision, as it does not here (R. Vol. II, 53-54), the presence of the law member at the court-martial sessions is not essential. See Section 38(c), p. 28, Section 51, p. 39, Manual for Courts-Martial, 1928; Digest of Opinions JAG, 1912-1940, § 365 (10), p. 176; see also question 5 of the General Court-Martial Data Sheet (R. Vol. II, 11).[5] To impose strict judicial supervision over the appointing authority's discretion in detailing a law member even though a properly detailed law member need not participate at any particular session would indeed be strange. The proper conclusion, so far as the courts are concerned, is to abide the appointing authority's determination both as to the officer appropriately to be designated as law member and as to whether, in a particular case, he should be excused from attendance. Judicial inquiry beyond the facts appearing on the face of the order convening the court-martial (see *Mullan* v. *United States*, quoted *supra*, pp. 17-

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[5] The present AW 8, effective February 1, 1949 (10 U.S.C. Supp. II, 1479), forbids the performance of the vital functions of the court-martial in the absence of the law member. See *infra*, pp. 24-26.

18 and see *infra*, pp. 30-32) would be inconsistent with settled doctrines established by this Court and understood by Congress when AW 8 was enacted.

B. *The legislative history of AW 8 indicates a Congressional purpose to confer on the appointing authority a discretion to determine more than the physical availability of a JAG officer.*—Sole reliance for discerning the Congressional purpose in AW 8 need not be placed on the fact that this Court's decisions, referred to above, were available to Congress at the time of its enactment. For it appears, additionally, that in its consideration of the bills which became the 1920 Articles of War, Congress had before it a proposal in the following language:

> No person shall be appointed judge advocate for a general court unless at the time of his appointment he is an officer of the Judge Advocate General's Department, except that when an officer of that department is not available the appointing authority shall appoint an officer recommended by the Judge Advocate General of the Army as specially qualified by reason of legal learning and experience to act as judge advocate, * * *.

It is to be understood that the reference in this proposed bill (S. 64, 66th Cong., 1st Sess., Art. 12)[6] to the position of "judge advocate" was not to

[6] This bill is printed in Hearings on S. 64 before a Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st Sess., p. 5.

what is now known as the "trial judge advocate" but, rather, to one who, though not a member of the court, was required "fairly, impartially, and in a judicial manner" to perform functions akin to those now performed by the law member.[7]

What is of significance now is the addition in AW 8, as enacted, of the phrase "for the purpose" to the provision in S. 64 for a substitute appointment "when an officer of that department is not available". This developmental history of AW 8 certainly confirms the Judge Advocate General's view, to which reference has already been made (*supra*, p. 14) that AW 8 "imports not only the narrow concept of physical accessibility, but also the broader concept of discretion in the determination of the suitability of the person".

There is evidence, too, that in determining "availability for the purpose", the appointing authority was to have a discretion subject to even less review, if that is possible, than that theretofore accorded by this Court to similar determinations by military appointing authorities. For in *Martin* v. *Mott*, 12 Wheat. 19, *Mullan* v. *United States*, 140 U.S. 240, and *Bishop* v. *United States*, 197 U.S. 334, the statutory guides to the appointing authority were to detail a court of thirteen where

[7] The Act of June 4, 1920, c. 227, 41 Stat. 759, contained two chapters. The first reorganized the military establishment; Section 8 (41 Stat. at 765) provided for a JAGD consisting of one Judge Advocate General and 114 other officers. The second chapter revised the Articles of War, and provided, for the first time in American legislation, for law members of general courts-martial (AW 8; 41 Stat. at 788).

that could be accomplished either "without manifest injury to the service" or "without injury to the service". See *supra*, pp. 16, 17, 19. In the hearings on the bills which eventuated in the 1920 Act, previously referred to, Major General Enoch H. Crowder, then Judge Advocate General, United States Army, conveyed to Congress his understanding that "serious injury to the service" might impose more stringent limitations on a discretionary power than a direction to determine "availability". In discussing a proposed change in the then existing AW 17, which provided in relevant part that "The accused shall have the right to be represented before the court by counsel of his own selection for his defense *if such counsel be reasonably available*, * * * " (emphasis supplied), General Crowder stated at page 1165 of the Hearings:

> The provision here "reasonably available," is sought to be eliminated in the bill before you (art. 22) and it will bring up for consideration the case that I presented to the committee at the time the 1916 revision was under consideration, an actual case of an officer being tried by a court-martial in Alaska for embezzlement, making an application for the professor of law at the Military School, Staff College, at Leavenworth, to be sent all the way to Alaska for his defense. It might result in an accused person undergoing trial in Mindanao, in the Philippine Islands, applying for some man serving in Alaska to act as

his counsel. Upon that explanation, the Military Committee of the House, which first wanted to grant the right of counsel in absolute terms, qualified it by the language "if such counsel be reasonably available." The corresponding provisions of the pending bill is that military counsel of the accused's selection shall be assigned, unless the appointing authority shall certify that "serious injury to the service" would result from the detail. What is serious injury? Is it to be measured in dollars and cents of transportation or mileage? Is one class of duty to be measured against another? Are we here in the field of prejudicial error; or, because compliance with a statute is involved, are we in the field of jurisdictional error?

The term "reasonably available" was thus deliberately retained in AW 17 of 1920 with respect to military counsel, in order to vest in the appointing authority a broad discretion in the matter of affording an accused such counsel—a discretion whose exercise could not be challenged as jurisdictional error. The use of the cognate phrase "available for the purpose" in AW 8 clearly evidences an identical purpose.

The present AW 8 which became effective on February 1, 1949 (10 U.S.C., Supp. II, 1479) omits the phrase "available for the purpose."[8] It pro-

[8] The new AW 8 provides in relevant part: "The authority appointing a court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Corps or an officer who is a member of

vides further that no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The appointment as law member of a court-martial of either an officer of the Judge Advocate General's Corps or one who is a member of the bar, and the presence of the law member during the trial, balloting and sentence are thus now expressly made mandatory. The legislative history of this new AW 8 (Act of June 24, 1948, c. 625, Title II, Section 205, 62 Stat. 628) shows that in these respects it effected a change in the provisions of the pre-existing AW 8. In 1946, the House Committee on Military Affairs, after a year's study of "court-martial procedure and the entire judicial system of the Army," H. Rep. No. 2722, 79th Congress, Second Session, pp. 2-3, made, among others, the following recommendation to the House:

> *Recommendation 4*
>
> That article of war 8 be amended in such manner as to require that the law member of a general court martial be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal

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the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: *Provided*, that no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. * * *"

court, or the highest court of a State or Territory of the United States;

* * * * *

That failure to observe the foregoing provisions shall constitute a jurisdictional error; * * *.

On April 14, 1947, Kenneth C. Royall, then Under Secretary of War, testifying before the House of Representatives Committee on Armed Services, Sub-Committee 11, Legal, outlining some of the principal changes in H.R. 2575, the bill which was incorporated in substance in S. 2655, 80th Congress, 1st Sess., which eventually became the 1948 Act, said:

> It is made a jurisdictional requirement * * * that the law members of general courts-martial must be either officers of the Judge Advocate General's Department or if there are not enough of those, as will sometimes arise in certain situations, trained lawyers designated as qualified by the Judge Advocate General. * * * [No. 125, Subcommittee Hearings on H.R. 2575 to amend the Articles of War, to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes, p. 1918.]

Finally, the 1949 Manual for Courts-Martial, at page 3, states for the first time: "Failure to appoint a law member of a general court-martial

who is qualified as prescribed in Article 8 renders any proceeding of such a court void."

We submit that the foregoing makes inescapable the conclusion that AW 8, as it stood at the date of respondent's court-martial, was intended to be construed as investing in the appointing authority the discretion and final authority, not subject to civil review, to determine whether an officer of the Judge Advocate General's Department was "available for the purpose" of serving as law member of a court-martial.

C. *AW 8 has been consistently interpreted and applied by the Army as vesting a complete discretion in the appointing authority.*—In CM 209988, Cromwell, 9 B. R. 169, 196 (1938), the Board of Review, affirming the conviction of the accused, said:

> Counsel contend that a member of the Judge Advocate General's Department should have been appointed law member of the court. The requirement of Article of War 8 for detail of officers of the Judge Advocate General's Department as law members of general courts-martial is subject to the exception that another qualified officer is to be appointed when an officer of the Judge Advocate General's Department is not available. The appointment of an officer other than a member of the Judge Advocate General's Department as a law member imports a decision by the appointing authority that an officer of this category is not available for the duty. Such a decision reached

> in the exercise of a sound discretion must, in the interests of efficient administration of justice and exercise of command, be held to be conclusive upon the question of availability. The discretion lodged in the appointing authority in this respect does not differ in principle from that formerly lodged in the appointing authority with respect to the number of officers, within prescribed maximum and minimum limits, which might be appointed as members. In that connection it was held that the decision of the appointing authority, in the exercise of his discretion, was conclusive. *Martin* v. *Mott*, 25 U. S. (12 Wharton) 19, 35. See also par. 7, M. C. M., 1917.

In CM 231963, Hatteberg, 18 B. R. 349, the Judge Advocate General declined to concur in the opinion of the Board of Review that the court-martial was illegally constituted because the law member was not an officer of the Judge Advocate General's Department although two other members of the court were such officers. The Judge Advocate General said, at page 368:

> From the above precedents it appears that the word "available" imports not only the narrow concept of physical accessibility but also the broader concept of discretion in the determination of the suitability of the person or thing desired * * *.

Then, citing with approval the above quoted language from the *Cromwell* case, he went on:

The above decision and many others similar thereto recognize the basic principle that military justice and the rules and regulations governing trial by courts-martial are designed to meet the needs of efficient military administration, which places substance above form, and justice above the appearance of justice.

2 Bull. JAG, p. 466, Section 365(9) summarizing CM ETO 804, Ogletree, 2 B. R. (ETO) 337 (1943) states:

Accused was found guilty of assault with intent to do bodily harm with a dangerous weapon in violation of A. W. 93. The defense challenged the law member for cause, on the ground that he was not a member of The Judge Advocate General's Department and that officers of that department were available to the appointing authority for appointment as law member. After taking evidence as to the question of availability, the court refused to sustain the challenge. Held: The record is legally sufficient to support the findings and sentence. The designation of a law member was a matter for the exclusive determination of the appointing authority, was not subject to review by the court on a challenge for cause, and cannot be reexamined by the Board of Review. The ruling of the court denying the challenge was correct, but evidence should not have been received on the question of availability. [Cf. CM 231963, 2 Bull. JAG 304, August 1943.] CM ETO 804 (1943).

Section 365(9), p. 175, Digest of Opinions of the Judge Advocate General (1912-1940) makes the following statement:

> It is not necessary for the convening order to state that the ranking member of a general court-martial is especially qualified for law member thereof, when the ranking member is designated as law member. The specific designation of the ranking member of the court as law member thereof imports that, in the opinion of the convening authority, he is especially qualified for that position. In cases already tried in which the ranking member of the court was designated as law member without explanation, such action is not irregular or prejudicial to the substantial rights of the accused. 250.43, April 6, 1921.

Moreover, as we have already pointed out, *supra*, p. 20, the presence of the law member at the proceedings of the court-martial was not essential unless the convening order required it. And the convening order did not always do so. Had the law member provision of AW 8 been regarded as jurisdictional, logic would have dictated that the presence of the law member at proceedings of the court-martial be made mandatory in all cases.

This consistency of interpretation by the Army is of great significance in determining the proper construction of AW 8. "* * * the manner in which court-martial jurisdiction has long been exercised by the Army and Navy is entitled to great

weight in interpreting the Articles." *United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210, 216; see also *United States* v. *Johnston*, 124 U. S. 236, 253.

D. *Nothing appears on the face of the order convening the court-martial which suggests an improper exercise of the appointing authority's discretion.*—If the determination of the appointing authority in this case, that an officer of the JAG was "not available for the purpose" of serving as law member, is reviewable at all, that review must be limited, as indicated in *Mullan* v. *United States*, 140 U. S. 240, 245, quoted *supra*, p. 18, to the facts "appearing upon the face of the order convening the court". But the only fact appearing on the face of the order in this case is that Captain Chalkley, an officer of the Judge Advocat. General's Department, was available for service as an assistant trial judge advocate.[9] This may suffice to show physical availability;[10] it certainly shows no more.

There may have been the very best of reasons why the appointing authority considered Captain Chalkley "not available for the purpose" of serving as law member. Certainly, it cannot be said

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[9] It has already been pointed out, *supra*, note 1, p. 4, that the Court of Appeals was in error when it stated that two members of the Judge Advocate General's Department were detailed "to serve as assistant trial judge advocates". (R. 68.)

[10] As has been noted, *supra*, p. 4, Captain Chalkley was in fact absent "VOCG" (verbal orders of the commanding general) from respondent's trial.

that he was better qualified to perform the duties of law member than was Colonel Bush, the latter then an officer of more than twenty-five years' commissioned service.[11] There is no fixed rule of law or fact that every officer of the JAGD is, *virtute officii*, qualified to rule on questions of evidence arising in the course of a trial; there are many lawyers even in civil life, of eminence and ability, whose talents do not lie in that direction.

The duties of the Judge Advocate General's Department are manifold. Officers of that department are utilized at all levels of administration of military justice, not to speak of their usefulness as legal advisers to other branches of the service engaged in other operations. JAG officers perform investigative functions, make recommendations as to prosecution, serve as defense counsel or trial judge advocates, and review, in several stages, the court-martial determinations.[12] The question of availability of a JAG officer for the purpose of serving as law member is thus not to be answered in terms of his physical proximity to the court-

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[11] Official Army Register (1949) p. 77 (Bush, James Emerson, 010332).

[12] See Pasley & Larkin, *The Navy Court Martial: Proposals for its Reform*, 33 Cornell Law Quarterly, 195, 208: "[In the Army] During World War II, because of the shortage of judge advocate officers, it was the exception rather than the rule for one to be appointed as law member (the exceptions usually being cases of especial complexity or seriousness), although judge advocate officers were frequently detailed as trial judge advocate." If the decision below is sound there must, necessarily, therefore, be a wholesale release from confinement of convicted Army personnel.

martial. See *Henry* v. *Hodges*, 171 F. 2d 401, 403, *supra*, pp. 14-15. For the needs of the service, the particular abilities and experience of the officers, JAG and others, to serve as law members cannot be ignored.

It follows that respondent's showing of Captain Chalkley's physical availability for detail as law member does not suffice as a showing that the appointing authority abused his discretion in failing to appoint the Captain to the post.

II

There Are No Other Grounds for Respondent's Release on Habeas Corpus

Apart from its ruling that the order convening the court-martial did not comport with the requirements of AW 8, the court below held that respondent had been denied due process of law. It cited what it referred to as "a few patent instances," the totality of which required respondent's discharge from custody (R. 70):

> 1. Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty.
>
> 2. Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation.
>
> 3. The record reveals that the law member appointed was grossly incompetent.

4. There was no pre-trial investigation whatever upon the charge of murder.

5. The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense.

6. The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.

Because of the difficulties inherent in dealing with a "cumulative" (R. 71) judgment, short of urging this Court to read the court-martial record for itself, we must deal with the particular alleged irregularities cited by the court below. At the outset, however, it should be noted that on habeas corpus, a civil court can determine only whether a military court-martial was without jurisdiction; other matters are left for review by military authority. *In re Yamashita*, 327 U. S. 1, 8. See also *Humphrey* v. *Smith*, 336 U. S. 695, 696; *Ex parte Quirin*, 317 U. S. 1, 25; *Grafton* v. *United States*, 206 U. S. 333, 345-348; *Carter* v. *McClaughry*, 183 U. S. 365, 381; *Johnson* v. *Sayre*, 158 U. S. 109, 118; *Smith* v. *Whitney*, 116 U. S. 167, 177; *Kurtz* v. *Moffitt*, 115 U. S. 487, 500; *Keyes* v. *United States*, 109 U. S. 336, 340; *Ex parte Reed*, 100 U. S. 13, 23. As this Court said *In re Grimley*, 137 U. S. 147 at page 150:

> * * * it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a

> court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established the habeas corpus must be denied and the petitioner remanded.

A. *The theory of law applied by the Army and the evidence of premeditation.*—The view of the court below that an erroneous theory of the duty to retreat was applied to respondent, that the evidence did not measure up to malice, premeditation or deliberation, and that the army reviewing authorities mistook the applicable law (instances 1, 2, and 6, *supra*, p. 33) is not only beyond that court's jurisdiction to assert; it is, in addition, baseless.

To begin with, the reviewing authority did not hold, as was said below, that respondent should have retreated from his post of duty. The reviewing staff Judge Advocate said (R. Vol. II, 17-18):

> The rule is further qualified by the important principle that before a person may take life in defense of his own, he must have retreated as far as he safely can. No evidence was offered that accused in this case could not have withdrawn within the shack, closed the door, and thereby avoided further conflict with the two Poles.

This did not call for a retreat from post of duty. On the contrary, it required nothing more than closing the door to those causing the trouble who had already left the post.

That portion of the staff Judge Advocate's opinion upon which the judgment of the court below was apparently based certainly does not imply that respondent should have retreated from his post (R. Vol. II, 17):

> * * * Even had the Pole swung at accused with a bottle as is stated by the accused, such act was not sufficient to justify the shooting. To excuse a killing on the grounds of self-defense upon a sudden affray, the killing must have been believed, on reasonable grounds, by the person doing the killing, to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed, on reasonable grounds, to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can (Par. 148a, MCM 1928, page 163). "When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die." (*Comm.* v. *Drum*, 58 Pa. St. 992) (XXI Board of Review, JAG, page 271, CM 235044 *Winters*).

There is, in this extract, nothing inconsistent with the view, previously quoted, that respondent was required at least to show why he could not retreat into his shack. Moreover, these comments were nothing more than an "even if" assumption, *arguendo*, that respondent's version of the killing was credible, an assumption which was expressly

rejected: "Taken as a whole the testimony of the accused, insofar as it is suggestive of a theory that he acted in self-defense, is not convincing." (R. Vol. II, 17.) More basically, what the majority below overlooked in holding that the accused was under no duty whatever to retreat was that its views in that respect are not engraven in the Constitution and need not control military tribunals. The 1928 Manual for Courts-Martial, prescribed by executive order of the President, pursuant to Act of Congress (see p. IX of Manual), provided at par. 148a, p. 163:

> To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can.

Considering this provision in connection with respondent's own statement that the Polish guards were unarmed and that when they left he took his pistol and followed them to the door (R. Vol. II, 79, 82), we think that there was adequate support, even in respondent's own version of the killing, for the conclusion that he had not made out a case of self-defense.

It follows, therefore, that the majority below made the two-fold error, on the one hand, of reviewing what was not reviewable and, on the other hand, of holding that a determination in accordance with the pertinent military law was a denial of due process. As was said in *United States ex rel. French* v. *Weeks*, 259 U. S. 326, 335:

> As a Colonel in the Army, the relator was subject to military law and the principles of that law, as provided by Congress, constituted for him due process of law in a constitutional sense. *Reaves* v. *Ainsworth*, 219 U. S. 296, 304.

See also the *United States ex rel Creary* v. *Weeks*, 259 U. S. 336, 344.

But, in any event, the decision below attributed to the court-martial the reasoning of the reviewing staff judge advocate. It is possible and altogether likely, however, that the court-martial rejected as incredible respondent's account of the occurrence and accepted the testimony of the two eye witnesses who were present. The surviving Polish guard stated that he and his companion had entered the guardhouse and were ordered out. They left. This was confirmed by the German girl who was with respondent. The Polish witness denied that anyone had struck anyone or that there had been any violence of any kind in the guardhouse. Respondent went to the door with a pistol in his hand. That the deceased should have used a bottle to attack a man armed with a pistol borders on the incredible,

and the surviving Polish guard categorically denied that he had done so or that either had done any more than say, "Boy, it is OK what you do." Furthermore, no bottle was discovered at the scene by either of the two American soldiers who arrived almost immediately after the shooting. A bottle was seen at the guardhouse by Private Wesoelewski, who relieved respondent as guard, between 8:30 and 9:00 P.M., which was a half hour to an hour after respondent came to the guardhouse and almost as long after the shooting, which occurred within five minutes of the time respondent went on duty. Respondent testified, without fixing the time, that after he shot the deceased, he picked the bottle up from the ground where it had been dropped and placed it inside the door of the guardhouse. But it was obviously possible, and the court-martial could properly have so found, that, during the interval between the arrival of the American soldiers who saw no bottle and that of the relief guard, respondent, having decided upon his story, fixed upon a bottle that had been within the shack and placed it where it was seen. So also the court-martial could, with propriety, have found that respondent shot the deceased in cold blood, without provocation of any kind. On this theory, amply supported by the credible evidence, respondent did the killing with malice, premeditation and deliberation. We submit that the record completely supports the verdict, the validity of which would not be affected even if the reviewing authority had approved it on a mis-

taken theory of law. It seems clear that there were errors of neither fact nor law by the military; and even if there were, such errors would be no ground for habeas corpus.

B. *The competence of the law member and defense counsel.*—The criticisms of the competence of the law member and defense counsel (instances 3 and 5, *supra*, p. 33) are without substance. As to the former, the short answer is that he made no ruling prejudicial to respondent. While he obviously misapprehended the nature of leading questions, his rulings in the main restricted the prosecution (R. Vol. II, 61, 63, 64, 66, 74). On the other hand, the sustaining of the objection to the question by the defense as to who a witness, who had not been present at the time, thought did the shooting (R. Vol. II, 75) was obviously correct. So also was the ruling that Miss Rehm's answer to the question as to the whereabouts of the deceased that "He was dead—I didn't know it at the time", was irresponsive (R. Vol. II, 66). And while the ruling that the defense would have to recall a witness, then on the stand, in order to question him (R. Vol. II, 92) was unduly technical, it was entirely harmless since the witness was recalled and questioned by the defense (R. Vol. II, 93-94).

As for the defense counsel, his competence cannot properly be judged outside the framework of the facts that hemmed him in. Respondent had told him he had no witnesses and "didn't know any-

thing to tell him". (R. 42-43). Respondent had already given his version of the occurrence in a sworn statement made during the pre-trial investigation (R. Vol. II, 35-36). In a vital respect, this story was contradicted in the pre-trial statement of both eye witnesses, the German girl and the surviving Polish guard. Respondent claimed, as he did at the trial, that one of the Poles made advances to the girl, that respondent asked the Poles to leave, and that one of them struck him on the lip (R. Vol. II, 35). The girl, however, making no mention of anyone touching her, stated, "They [the Polish guards] said to me: 'Hello Miss'. Brown got mad and holding in his left hand a pistol and in his right one a rifle he walked toward the Poles and hollered in German: 'Raus' which they did" (R. Vol. II, 31). This was substantially the statement of the surviving Polish guard who said further, that when he and his companion were outside the guardhouse, he said to respondent, "It is OK boy", whereupon respondent fired the shot that struck the deceased (R. Vol. II, 33). This was in flat contradiction to respondent's claim that deceased had attacked him with a bottle.

Against these facts it is difficult to see what alleged acts or omissions of defense counsel would have been avoided by the dictates of competence.

We think that this case demonstrates the desirability of avoiding, on habeas corpus, an evaluation of the competence of members of a court

martial—a task which, at best, is fraught with difficulty and delicacy.

C. *The pretrial investigation.*—The court below rejected the district court's determination that the "70th Article of War was substantially complied with in the pretrial investigation as was also the 43rd Article of War" and "the other grounds for habeas corpus alleged are without merit." (R. 54.) The majority of the Court of Appeals said: "although in the latter case [*Humphrey* v. *Smith*, 336 U. S. 695] the Supreme Court held that the pretrial investigation under Article of War 70 is not a jurisdictional requirement, the entire absence of any investigation whatever upon a charge of murder is still a circumstance to be considered in determining whether there has been a denial of due process" (R. 70, footnote 4). Wholly apart from the ruling of *Humphrey* v. *Smith* that the failure to conduct any pretrial investigation would not affect the validity of the judgment of the court-martial so far as habeas corpus courts are concerned, the fact is that in the case at bar an adequate pretrial investigation was actually made. The court below has seized upon the fact that the investigation was initiated upon a charge of violation of the 93rd Article of War and that, after the investigation, the charge was changed to a violation of the 92nd Article of War. But the specifications of the charge were at all times to the effect that the accused "with malice aforethought, willfully,

deliberately, feloniously, unlawfully, and with premeditation" killed the deceased (R. Vol. II, 21). And the facts supporting both the charges of violating the 92nd and the 93rd Articles of War were identical. What the majority of the Court of Appeals held to have been error was the failure to interview the same witnesses and elicit precisely the same facts upon the new charge as were obtained from those witnesses in the investigation already made.

Thus, AW 70 the intent of which is to determine whether in fact a trial is necessary (see 1928 Manual for Courts-Martial, Section 35, page 24; see also Petitioner's Brief in *Humphrey* v. *Smith*, Oct. Term 1948, No. 457, pp. 30-37) has been distorted by the majority below into a ceremonial rite requiring formal and mechanical adherence irrespective of the fact that such adherence could serve no useful purpose since no further investigation was required to determine whether and on what charges the accused should be tried.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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